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No. 94-1467 (3)

Supreme Court
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In The

Supreme Court of the United States

October Term, 1994

TAMPA CROWN DISTRIBUTORS, INC.,

Petitioner,

vs.

DIVISION OF ALCOHOLIC BEVERAGES AND TOBACCO, DEPARTMENT OF BUSINESS REGULATION; AND OFFICE OF THE COMPTROLLER, STATE OF FLORIDA,

Respondent.

Petition For Writ Of Certiorari To The District Court Of Appeal First District, State Of Florida

REPLY BRIEF

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Respondent's arguments in opposition to our petition are rather startling. Respondent does not take issue with our showing that Tampa Crown followed Rule 12.4 to the letter and did what this Court's rules said that it could do. One would think that this admission would come as part of a pleading acknowledging that the Florida court's ruling cannot stand. Yet, notwithstanding its recognition that Tampa Crown followed the rule's plain directive, respondent maintains that this Court should ignore Tampa Crown's plea for review. The reasons that Respondent offers are easily refuted.

1. Respondent suggests that Tampa Crown was not entitled to rely on the rule's plain and unambiguous language, but should have considered the legislative history of Rule 12.4 and realized that the language emerged from a recommendation by the "authors of the Third Edition of Supreme Court Practice." Brief in Opp. 6. Once Tampa Crown understood the reason for these authors' recommendation, respondent contends, Tampa Crown would have realized that "it is implausible" to read the rule as meaning what it says. *Id.* This argument flies in the face of this Court's plain language jurisprudence. It is frivolous to suggest that a party is not entitled to rely on a plain and unambiguous rule unless it also delves into conjecture about the sources of the rule and whether the rule really means what it plainly says.

2. The cases that respondent has cited do nothing to call the plain language of Rule 12.4 into question. *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394 (1981), involves a party's appeal from the District Court to the Court of Appeals, a matter that has nothing to do with Rule 12.4. See Pet. for Cert. 3 (explaining that Rule 12.4 is very "different from rules that govern other forms of

review in the federal system"). Similarly, *Diamond v. Charles*, 476 U.S. 54 (1986), simply holds that at least one actively arguing party must have standing in order for the case to be heard in this Court. This standing issue is not a factor in Tampa Crown's petition. See Pet. for Cert. 14 n.3.

3. In a footnote, respondent suggests that there might be some question about whether consolidated cases constitute one "proceeding" for purposes of Rule 12.4. Understandably, the respondents decline to pursue this argument or put any weight on it. To begin with, in *Rake v. Wade*, 113 S.Ct. 2187 (1993), the Court had before it a case that had been consolidated in the lower courts. The Court stated that those parties that did not join the petition for certiorari became parties "in this Court under this Court's Rule 12.4." *Id.* at 2189 n.1. Moreover, as we explained in our petition, the Florida Supreme Court issued but one opinion and but one judgment in 1988. Whatever effect consolidations may have in other legal settings, it is obvous that Tampa Crown and McKesson were both parties "to the proceeding in the court whose judgment [was] sought to be reviewed." S. Ct. Rule 12.4.

4. Finally, respondent seeks to justify its position by asserting that the issue is not of great practical importance because "it is easily avoided" by having each party file its own petition. If respondent were proposing an amendment to this Court's rules, this suggestion might be well-taken. But it is supremely unjust to argue that a party who takes one of the routes that a rule plainly allows should be penalized because it could have chosen to take another route instead.

* * *

When all is said and done, one things remains clear. Tampa Crown's action fully complied with what this Court's Rule 12.4 told it to do in order to preserve its party status. It would have been the easiest thing in the world to file a one-page brief adopting McKesson's arguments. But Rule 12.4 told Tampa Crown that it did not have to do this – that it was unnecessary to burden the Court with superfluous pleadings. Tampa Crown has now been told that it has lost its right to pursue its constitutional remedy because of its reliance on this rule. Only this Court can remedy this injustice and only this Court can ensure that Tampa Crown and the countless other parties who read and rely on Rule 12.4 each year are not punished for doing precisely what this Court's rules say.

Respectfully submitted,

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